A

SIAW KIM SEONG

v.

SIEW SWEE YIN & ANOR

B

COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM JCA
MOHD GHAZALI YUSOFF JCA
TENGKU BAHARUDIN SHAH JCA
[CIVIL APPEAL NO: N-02-181-2005]

C

26 MAY 2008

CIVIL PROCEDURE: *Pleadings - Issue not pleaded - Duty of judge - Whether must decide case on pleadings before him*

D

LAND LAW: *Transfer - Fitness of instrument - Whether signature on memorandum of transfer forged - Expert evidence - Totality of evidence - Legal consequences of instrument of transfer being a forgery*

This was an appeal against the order of the High Court dismissing the plaintiff's claim against the defendants for specific relief relating
E to a piece of land. The plaintiff was at all material times the holder of the land but later discovered that it had become registered in the joint names of the defendants pursuant to a memorandum of transfer that had purportedly been executed by the plaintiff in their favour. The plaintiff contended that he had never signed that
F instrument of dealing and the signature on the memorandum was, hence, a forgery. To establish his case, the plaintiff called an expert – a Government document examiner – who testified that the instrument was indeed a forgery, which expert testimony the High Court judge rejected. In finding for the defendants, the judge
G proceeded upon two main grounds. First, he found that the plaintiff had no *locus standi* to bring the action and, second, he accepted the defendants' evidence that the plaintiff had indeed executed the disputed instrument of transfer.

H **Held (allowing the appeal)**
Per Gopal Sri Ram JCA delivering the judgment of the court:

(1) The judge clearly erred in dismissing the plaintiff's claim on the
I first ground as it was never the defendants' pleaded case that the plaintiff had no standing to sue. Quite the contrary. The point was therefore clearly not on the record of the court. It was the duty of the judge to decide the case on the pleadings

before him, which he failed to do. If this were the only disclosed error, the judgment would be set aside and a retrial ordered. However, a retrial was not called for because of the second ground offered by the judge for dismissing the claim. The judge was plainly wrong in finding for the defendants in the teeth of evidence that went the other way. On the facts of the present case, the judge ought to have acted on the totality of evidence relating to the issue of forgery and then compared the plaintiff's signatures on the relevant documents. Had he done so, he would – as any reasonable tribunal similarly circumstanced would – have come to the conclusion that the instrument of transfer was a forgery. Further, the plaintiff himself gave evidence that the signature on the instrument of transfer was not his, which evidence the judge did not appear to have evaluated sufficiently. Thus, the findings made by the judge on the issue of forgery clearly could not stand. The legal consequence of the instrument of transfer being a forgery was that it was null and void and of no effect. The defendants, therefore, took no title at all. (paras 4, 6, 7, 8 & 9)

Bahasa Malaysia *Translation Of Headnotes*

Ini adalah rayuan menentang arahan Mahkamah Tinggi yang menolak tuntutan plaintif terhadap defendan-defendan untuk relif spesifik berhubungan dengan sebidang tanah. Plaintif pada setiap masa relevan memegang tanah tersebut tetapi selepas itu mengetahui bahawa ianya telah didaftarkan di bawah nama sepunya defendan-defendan melalui memorandum pindahan yang nampaknya disempurnakan oleh plaintif di dalam nama-nama mereka. Plaintif mendakwa bahawa dia tidak pernah menandatangani suratcara urusan itu dan tandatangan pada memorandum tersebut, oleh itu, ialah satu pemalsuan. Untuk mengukuhkan kesnya, plaintif memanggil seorang pakar – seorang penyemak dokumen Kerajaan – yang memberi keterangan bahawa suratcara tersebut memang pemalsuan, yang mana testimoni pakar itu ditolak oleh hakim Mahkamah Tinggi. Di dalam membuat keputusan yang berpihak kepada defendan-defendan, hakim menggunakan dua alasan utama. Pertama, dia berkeputusan bahawa plaintif tiada *locus standi* untuk membawa tindakan tersebut dan, kedua, dia menerima keterangan defendan-defendan yang plaintif telah menyempurnakan suratcara hantaran yang dipertikaikan itu.

Diputuskan (membenarkan rayuan)
Oleh Gopal Sri Ram HMR menyampaikan penghakiman mahkamah:

(1) Hakim telah khilaf apabila menolak tuntutan plaintif berdasarkan alasan pertama kerana ia tidak pernah diplid oleh defendan-defendan yang plaintiff tiada hak untuk mendakwa. Sebenarnya sebaliknya. Perkara tersebut jelas tiada di dalam rekod mahkamah. Ia adalah tugas mahkamah untuk memutuskan kes berdasarkan pliding-pliding dihadapannya, yang mana dia gagal lakukan. Jika ini adalah satu-satunya kesilapan, penghakiman tersebut akan ditolak dan perbicaraan semula diarahkan. Akan tetapi, perbicaraan semula tidak diarahkan disebabkan alasan kedua yang diberi oleh hakim untuk menolak tuntutan itu. Hakim jelas khilaf dengan membuat keputusan yang berpihak kepada defendan-defendan memandangkan keterangan di kes ini yang bertentangan. Memandangkan fakta kes ini, hakim sepatutnya bertindak ke atas kesuluruhan keterangan yang berkaitan dengan isu pemalsuan dan selepas itu membandingkan tandatangan-tandatangan plaintif pada dokumen-dokumen relevan. Kalau dia berbuat demikian, dia akan – seperti mana-mana tribunal munasabah dalam keadaan yang sama akan – mencapai keputusan bahawa suratcara hantaran itu adalah satu pemalsuan. Lagi pun, plaintif sendiri memberi keterangan yang tandatangan pada suratcara hantaran tersebut bukan dia punya, yang mana keterangan tersebut tidak dipertimbangkan dengan secukupnya oleh hakim. Oleh itu, keputusan hakim berkaitan isu pemalsuan tidak dapat diterima. Akibat di sisi undang-undang ialah oleh kerana suratcara hantaran tersebut satu pemalsuan, ia batal dan tak sah dan tiada kesan. Defendan-defendan, oleh itu, tidak memperolehi apa-apa hakmilik langsung.

Case(s) referred to:
Adorna Properties Sdn Bhd v. Boonsom Boonyanit [2001] 2 CLJ 133 FC ***(refd)***
Hj Mohamed Dom v. Sakiman [1956] MLJ 45 ***(refd)***
Kreditbank Cassel GMBH v. Schenkers Ltd [1927] 1 KB 826 ***(refd)***
Lee Ing Chin v. Gan Yook Chin [2003] 2 CLJ 19 FC ***(refd)***
PP v. Mohamed Kassim Yatim [1977] 1 MLJ 64 ***(refd)***
Satish Jayantilal Shah v. Pankaj Mashruwala [1996] Cri LJ 3099 ***(refd)***

Legislation referred to:
Evidence Act 1950, s. 73(1)

For the appellant - Teng Chang Kim (Cheng Chang Chai with him); M/s Aqmar, Ng & Assoc
For the respondents - Bernard Poi; M/s Poi Tzse Meng & Co

[Appeal from High Court, Seremban; Suit No: 22-55-1995]

Reported by Suresh Nathan

JUDGMENT

Gopal Sri Ram JCA:

[1] This appeal is directed against the order of the High Court dismissing the appellant's (plaintiff in the court below) claim against the respondents (defendants in the court below) for specific relief relating to a piece of land. The history of this litigation is as follows.

[2] At all material times the plaintiff was the holder of a piece of land held under Temporary Occupation Licence No. 1488. On 25 May 1972 he entered into an agreement with one Chung Soo Chong of Lee Hing Loong Mining Enterprise Sdn Bhd under the terms of which Chung was to surrender his land to the State Authority to re-settle the plaintiff and other occupants on another piece of land identified by Chung. The plaintiff was to give up his TOL in Chung's favour and move to the re-settled land. Each settler, including the plaintiff was to receive a title to a separate lot to be issued by the State. The plaintiff's case in the court below was that pursuant to the aforesaid agreement he applied to the State Authority to issue to him a title to the land that now forms the subject matter of the dispute. In his application, the plaintiff gave the second defendant's address as his own because he had by this time moved out to Kuala Lumpur. Having heard nothing for some time, the plaintiff asked the defendants about the status of his application. This seems fairly reasonable because all correspondence from the relevant department would be received by the second defendant. In March 1993, the plaintiff discovered (as a result of a letter from Revenue) that the land in question had been alienated to him. Upon making inquiries, the plaintiff discovered that the subject property(held under HS (M) Lis 7, No

PT 69, Plot 12, in the Mukim Pantai, Negeri Sembilan had become registered in the joint names of the defendants pursuant to a memorandum of transfer that had purportedly been executed by the plaintiff in their favour. The consideration disclosed in the memorandum was said to be RM2,000. According to the plaintiff he had never signed that instrument of dealing and the signature of the transferor on the memorandum was therefore a forgery. The defendants raised two issues in their defence. First, that the plaintiff was a mere trustee of the subject property for the defendants. This averment was based upon an assignment allegedly executed by the plaintiff in the defendants' favour. The plaintiff, however, denied that he had ever executed that document. The second defence taken was that the plaintiff had indeed signed the memorandum of transfer. So, on the pleaded case of the parties, these were the two issues that the trial court had to determine.

[3] In finding for the defendants, the learned judge proceeded upon two main grounds. First, he found that the plaintiff had no *locus standi* to bring the action. This finding flies in the face of the defendants' pleaded case in which they admitted that the subject property belonged to the plaintiff until he transferred it to them. Second, he accepted the defendants' evidence that the plaintiff had indeed executed the disputed instrument of transfer.

[4] Taking the first, we are of the view that the learned judge clearly erred in dismissing the plaintiff's claim on this ground. It was never the defendants' pleaded case that the plaintiff had no standing to sue. Quite the contrary. The point was therefore clearly not on the record of the court. It was the duty of the learned judge to decide the case on the pleadings before him. In *Haji Mohamed Dom v. Sakiman* [1956] MLJ 45, the only issue on record was whether a sale agreement was a forgery. The judge trying the action held it genuine but went on to refuse the plaintiff specific performance on the ground that it was a loan transaction. On the plaintiff's appeal it was held by the Court of Appeal that:

> a Judge is bound to decide a case on the issues on the record and that if there are other questions they must be placed on the record.

It is quite clear that the learned judge in the present appeal failed to adhere to this rule. If this were the only disclosed error we would set aside his judgment and ordered a re-trial. But there is here a reason why a re-trial is not called for. And that brings us to the second reason offered by the learned judge for dismissing the claim.

[5] We accept that the issue whether a document is a forgery is one of fact. In an ordinary case involving findings of fact, we do, as a general rule defer to the opinion formed by the judge who is audio-visually advantaged. But where the primary trier of fact has failed to judicially appreciate the evidence before him, this court will – indeed it is duty bound to – interfere and correct the error. In this behalf we need do no more than to quote from what we said in *Lee Ing Chin v. Gan Yook Chin* [2003] 2 CLJ 19 which was approved by the Federal Court when it went to them on second appeal:

> A judge who is required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and, for good reasons, either accepting or rejecting the whole or any part of the evidence placed before him. He must, when deciding whether to accept or to reject the evidence of a witness test it against relevant criteria. Thus, he must take into account the presence or absence of any motive that a witness may have in giving his evidence. If there are contemporary documents, then he must test the oral evidence of a witness against these. He must also test the evidence of a particular witness against the probabilities of the case. A trier of fact who makes findings based purely upon the demeanour of a witness without undertaking a critical analysis of that witness' evidence runs the risk of having his findings corrected on appeal. It does not matter whether the issue for decision is one that arises in a civil or criminal case: the approach to judicial appreciation of evidence is the same.

[6] In the present instance, we are entirely satisfied that the learned judge was plainly wrong in finding for the defendants in the teeth of evidence that went the other way. We are also satisfied that he did not properly evaluate the totality of the evidence nor draw from it such reasonable inferences that it warranted. To establish his case that the memorandum of transfer was forged, the plaintiff, apart from giving his own evidence, called an expert – a Government document examiner – who testified that the instrument was indeed a forgery. In essence what the learned judge did was to reject the expert testimony and accept the

A evidence of the defendants. In so doing he merely applied what Hashim Yeop A Sani J had said in *Public Prosecutor v. Mohamed Kassim bin Yatim* [1977] 1 MLJ 64, namely, that expert evidence especially of handwriting can never be conclusive in a criminal case. But in this case you do not have to be an expert to see for B yourself that the signature supposed to be of the plaintiff appearing on the memorandum of transfer and the assignment do not match even upon a cursory visual examination. In fact the signature said to be that of the plaintiff on the assignment is manifestly different from that appearing on the memorandum of C transfer. And both signatures are wholly different from the plaintiff's admitted signature appearing on the agreement he had with Chung. In our judgment, the learned judge could have – and on the facts of this case he should have – acted under s. 73(1) of the Evidence Act 1950 and made the comparison himself. That D section provides:

> 73. (1) In order to ascertain whether a signature, writing or seal is that of the person by whom it purports to have been written or made, any signature, writing or seal, admitted or proved to the satisfaction of the court to have been written or made by that E person, may be compared by a witness or by the court with the one which is to be proved, although that signature, writing or seal has not been produced or proved for any other purpose.

[7] Had the judge undertaken such an examination he would F have concluded, even without the aid of an expert, that the signatures appearing on the assignment and the transfer were plain and undisguised forgeries. And, in the present instance, he was clearly assisted by the evidence of the expert in coming to a conclusion on this part of the case. As observed by RR Jain J in G *Satish Jayantilal Shah v. Pankaj Mashruwala* [1996] Cri. LJ 3099:

> It is true that the Court cannot be an expert and base its conclusions merely on comparison of signatures by itself. But it can definitely compare the signatures in light of other admitted evidence on record. In this case, I have gone through the H judgement and nothing can be found that the Court by becoming an expert and comparing signatures has arrived at any particular conclusion. The Court has not made any observation like an expert's opinion. The Court has not at all based its finding on such evidence and, therefore, this contention has also no force in I the eyes of law. Under the law the Court has power to compare signatures/handwriting, strengthening its finding based on other

cogent material and evidence on record. Therefore, there is nothing wrong if handwritings are compared to strength its finding.

So, in the present case, the judge ought to have acted on the totality of the evidence relating to the issue of forgery and then compared the signatures. Had he done so, he would – as any reasonable tribunal similarly circumstanced would – have come to the conclusion that the instrument of transfer was a forgery.

[8] Quite apart from these matters, there is also the evidence of the plaintiff himself that the signature on the instrument of transfer is not his. The learned judge does not appear to have evaluated this evidence sufficiently or at all and given it the weight it deserved, corroborated as it was by the expert evidence and obviously different signatures. Further, he does not appear to have subjected the second defendant's evidence to critical analysis before accepting it. The second defendant was a witness with a purpose to serve. Yet there is nothing in the judge's judgment that addresses this important consideration. Further, he appears to have had no heed to the contradiction of the second defendant's testimony by the defendants' own witness, DW3, an advocate and solicitor upon a material particular. According to the tenor of the second defendant's witness statement DW3 was aware of the existence of the instrument of transfer. Yet, when DW3 came to give evidence he flatly denied any knowledge of this all important document. When faced with such a divergence of evidence within the defendants' case upon a matter of critical importance the learned judge ought to have treated the second defendant's evidence with suspicion and subjected it to the most careful scrutiny. Instead, he turned an indulgent eye upon it. As for the evidence of the other solicitor DW4, it is at best equivocal: for she quite frankly conceded that she could not remember if the parties had executed the instrument of transfer in her presence. From the foregoing discussion it is clear that the learned judge had plainly failed to judicially appreciate the evidence before him and to draw those reasonable inferences that it fairly admitted.

[9] For the reasons already given, the findings made by the learned judge on the issue of forgery clearly cannot stand. With respect, the learned judge ought to have held that the plaintiff did not sign the impugned memorandum of transfer and that document was therefore a forgery. The legal consequence of the instrument

of transfer being a forgery is that it is null and void and of no effect. See, *Kreditbank Cassel GMBH v. Schenkers Ltd* [1927] 1 KB 826. By virtue of the decision of the Federal Court in *Adorna Properties Sdn Bhd v. Boonsom Boonyanit* [2001] 2 CLJ 133, a person acquiring land from a forger may obtain an indefeasible title to it if he or she is a *bona fide* purchaser. However, the principle established in that case does not apply to the present facts because here it was the defendants themselves who were either the forgers or parties to the forgery. They did not acquire the subject property from a forger. Accordingly, they take no title at all.

[10] The appeal is accordingly allowed. The orders of the court below are hereby set aside. There shall be judgment for the plaintiff in terms of prayers (a), (b), (d) and (e) of his statement of claim. The costs in this court and those incurred in the court below shall be paid by the defendants to the plaintiff. The parties are hereby given general liberty to apply to the High Court for the carriage of the judgment herein entered. The deposit in court shall be refunded to the appellant.